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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/717,461	11/21/2003	Kjell-Tore Smith	115700	8061
29078	7590	04/08/2010	EXAMINER	
CHRISTIAN D. ABEL			GROUP, KARL E	
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NORWAY				
			ART UNIT	PAPER NUMBER
			1793	
			NOTIFICATION DATE	DELIVERY MODE
			04/08/2010	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No. 10/717,461	Applicant(s) SMITH ET AL.	
	Examiner Karl E. Group	Art Unit 1793	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 17 September 2009.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-5 and 7-42 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-5, 7-11, 13-26 and 30-40 is/are rejected.
- 7) ☒ Claim(s) 12, 27-29, 41, 42 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|---|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

1. The office action mailed 12-19-2008 is hereby withdrawn. It should be noted the appeal filed 6-17-09 was premature as claims 36-42 were NOT rejected twice. All claims must be rejected twice before a notice of appeal may be filed.

Claim Rejections - 35 USC § 112

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

3. Claims 1-5,7,8,15,16,18-26,32-35 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1, "the RDX crystals" lacks antecedent basis.

Claim 2, "the explosive crystals", "the RDX crystals" and "the HMX crystals" lack antecedent basis.

Claim 7 fails to further limit claim 2 because the HMX proportion is set forth in claim 2. A dependent claim must further limit the claim from which it depends.

Claims 15,16,32-35 which depend upon claim 11 which may in the alternative depend upon claim 9 which fails to set forth HMX crystals, therefor in claims 15,16,32-35 "the proportion of HMX crystals" and "HMX crystals" lack antecedent basis. Only claim 10 requires HMX crystals.

Claim Rejections - 35 USC § 102 and 103

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

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A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 9,11,13,14,30,31,36-40 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Han et al (6,485,587).

Han teaches an explosive composition produced by a slurry process comprising bimodal HMX and/or RDX and further including an elastomer and a plasticizer, see examples. The rejected claims do not claim a specific particle size that distinguishes from the mixtures taught by Han. With respect to claims 36-40 although Han fails to disclose the claimed pressability, it is well settled that when a claimed composition appears to be substantially the same as a composition disclosed in the prior art, the burden is properly upon the applicant to prove by way of tangible evidence that the prior art composition does not necessarily possess characteristics attributed to the CLAIMED composition. In re Spada, 911 F.2d 705, 15 USPQ2d 1655 (Fed. Circ. 1990); In re Fitzgerald, 619 F.2d 67, 205 USPQ 594 (CCPA 1980); In re Swinehart, 439 F.2d 2109, 169 USPQ 226 (CCPA 1971).

It should be noted the examples of the instant disclosure are not commensurate in scope with the claims because the claims fail to set forth the specific particle sizes require to achieve the claimed pressability.

7. Claims 10,11,13,14-16 are rejected under 35 U.S.C. 103(a) as being unpatentable over Han (6,485,587) further in view of Godsey (4,298,411).

Godsey teaches that it is known to use mixtures of HMX and RDX when employing a bimodal oxidizer in a propellant composition (col. 8, lines 15-31).

It would have been obvious to one having ordinary skill in the art at the time the invention was made to use mixtures of HMX and RDX as taught by Godsey since Godsey suggests that it is known to use mixtures of the two in a propellant with a bimodal oxidizer and since Han teaches HMX and RDX as bimodal oxidizers. It is also obvious to vary the amounts and sizes of the RDX and HMX to achieve a desired result. It is well-settled that optimizing a result effective variable is well within the expected ability of a person of ordinary skill in the subject art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980), In re Aller, 220 F.2d 454, 105 USPQ 233 (CCPA 1955). If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985).

1. Claims 36-40 are rejected under 35 U.S.C. 102(e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over the article to Rudolf et al (cited on IDS dated 3/9/2006).

This article recites bimodal HMX and RDX with Hytemp and DOA that is pressed to greater than 98 % TMD. The pressure is disclosed for a 50 mm diameter pellet. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985).

Alternatively, it would have been obvious to one having ordinary skill in the art at the time the invention was made to vary the pressure for different size pellets or to obtain different densities in order to optimize the explosive. It is well-settled that optimizing a result effective variable is well within the expected ability of a person of ordinary skill in the subject art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980), *In re Aller*, 220 F.2d 454, 105 USPQ 233 (CCPA 1955).

Applicants argument Rudolf achieves the density of greater than 98% at 1.2 kbar is not persuasive in overcoming the rejection because the pressure the density is achieved does not patentably distinguish the claimed article. The method used to form the article does not distinguish the claimed article, an article having density greater than 98% is still being claims and is not distinguishable from the article having density greater than 98% formed by Rudolf.

Allowable Subject Matter

8. Claims 1-5,7,8,17-26 would be allowable if rewritten or amended to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action.

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9. Claims 12,27-29,41,42 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

The prior art of record fails to teach or fairly suggest the specific particle sizes set forth in the claims.

10. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karl E. Group whose telephone number is 571-272-1368. The examiner can normally be reached on M-F (6:30-4:00) First Friday Off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jerry Lorengo can be reached on 571-272-1233. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Karl E Group/
Primary Examiner
Art Unit 1793

Keg
4-2-10